Lim Cheng Boon v F & N Dairies (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO MT1–22–990 OF 1998
NORAINI ABDUL RAHMAN JC
28 MAY 2009

Contract — Agency — Principal and agent — Whether relationship of agency exists — Whether agency agreement orally created — Whether plaintiff appointed as defendant's salesman — Whether nature of transactions between plaintiff and defendant merely that of sales and purchase of goods — Claim by agent against principal for breach of agency

The plaintiff brought this suit against the defendant for alleged breach of agency agreement which the plaintiff alleged was made orally between the defendant and the plaintiff. The plaintiff prayed, inter alia, for: (a) special damages RM126,080 for 12608 crates returned to the defendant, (b) special damages for RM50,000 for goods returned by the plaintiff to the defendant, (c) general damages for loss of business for RM5,000 per month from July 1998 till judgment date, (d) general damages for RM20,000 for loss of clients; and (e) general damages for RM300,000 for breach of contract. The defendant denied appointing the plaintiff as their agent. The defendant claimed that the transactions between them and the plaintiff were nothing more than sales and purchase of goods and crates ie that of a buyer and seller.

Held, allowing the plaintiff's claim in part with costs and allowing the defendant's counterclaim in part with costs:

(1) There was an agency between the plaintiff and the defendant because: (a) the defendant's invoice mentioned the word 'salesman' and was given a code number 2949; (b) the plaintiff was described as a distributor by the defendant; (c) the name Magnolia belonged to the defendant's company and the fact that in the plaintiff's invoice/cash bill bore the word Magnolia for Yeo's showed that there must have been some approval or consent given by the defendant to put that logo on their invoice/cash bill; (d) in normal cases, a customer or a buyer buying goods will not have an account kept by the seller let alone give a credit limit of 60 days to pay; (e) spoilt or damage goods could be returned and the plaintiff's accounts maintained by the defendants will be credited accordingly. This was no ordinary buyer/seller transaction (see para 6).

(2) The plaintiff testified that he had placed full trust in the defendant and never questioned or asked for the accounts. Even though the statement of accounts were sent to him, he said that some he received and some he did not. So, he was not certain of the amount he was claiming against the defendant in prayer (a) and (b). Therefore, the plaintiff's claim in paras (a) and (b) were dismissed. As for prayer (c) and (e) a sum of RM3,218.40 x 6 months was allowed. This was based on the net profit of RM38,621 which he had submitted to the Income Tax Department for the year of assessment 1998. Since no notice was given, a notice of six months was reasonable. Prayer (d) was not allowed since there was no proof that the defendant had used the plaintiff's list containing clients name to do business directly with them (see para 17).

[Bahasa Malaysia summary

Plaintif membawa tindakan ini terhadap defendan bagi suatu dakwaan kemungkiran perjanjian agensi yang mana plaintif mendakwa dibuat secara lisan antara defendan dan plaintif. Plaintif memohon, antara lain, untuk: (a) ganti rugi khas sebanyak RM126,080 untuk 12608 tong yang dipulangkan kepada defendan; (b) ganti rugi khas sebanyak RM50,000 bagi barangan yang dipulangkan oleh plaintif kepada defendan; (c) ganti rugi am untuk kerugian perniagaan sebanyak RM5,000 sebulan dari Julai 1998 hingga tarikh penghakiman; (d) ganti rugi am sebanyak RM20,000 untuk kehilangan pelanggan; dan (e) ganti rugi am sebanyak RM300,000 untuk kemungkiran kontrak. Defendan menafikan telah melantik plaintif sebagai ejennya. Defendan mendakwa bahawa transaksi antaranya dan plaintif hanyalah sekadar jual beli barangan dan tong-tong iaitu antara pembeli dan penjual.

Diputuskan, membenarkan sebahagian tuntutan plaintif dengan kos dan membenarkan sebahagian tuntutan balas defendan dengan kos:

(1) Terdapat hubungan agensi antara plaintif dan defendan kerana: (a) invois defendan menyatakan perkataan 'salesman' dan diberikan nombor kod 2949; (b) plaintif dijelaskan sebagai pengedar oleh defendan sendiri; (c) nama Magnolia merupakan kepunyaan syarikat defendan dan fakta bahawa dalam invois/bil tunai plaintif terdapat perkataan *Magnolia for Yeo's* menunjukkan bahawa tentunya ada kebenaran atau persetujuan diberikan oleh plaintif untuk meletakkan logo tersebut pada invois/bil tunainya; (d) dalam kes-kes biasa, seorang pelanggan atau pembeli yang membeli barangan tidak akan mempunyai akaun yang disimpan oleh penjual, inikan pula diberikan had kredit selama 60 hari untuk membayar; (e) barangan yang busuk atau rosak

boleh dipulangkan dan akaun plaintif yang disimpan oleh defendan akan dikreditkan sewajarnya. Ini bukannya transaksi jual beli yang biasa (lihat perenggan 6).

(2) Plaintif memberi keterangan bahawa dia meletakkan sepenuh kepercayaan atas defendan dan tidak pernah mempersoal atau bertanyakan tentang akaun-akaun tersebut. Walaupun penyata-penyata akaun tersebut dihantar kepadanya, dia menyatakan bahawa ada yang dia terima, ada yang dia tidak terima. Oleh itu, dia tidak pasti akan jumlah yang dituntutnya dalam permohonan (a) dan (b). Maka, tuntutan plaintif dalam perenggan (a) dan (b) ditolak. Berikutan dengan permohonan (c) dan (e), sejumlah RM3,218.40 x 6 bulan dibenarkan. Ini berdasarkan keuntungan bersih RM38,621 yang plaintif hantar kepada Bahagian Cukai Pendapatan bagi tahun taksiran 1998. Memandangkan tiada notis diberikan, notis selama enam bulan adalah munasabah. Permohonan (d) tidak dibenarkan kerana tiada bukti bahawa defendan telah menggunakan senarai nama pelanggan plaintif untuk berurusan terus dengan mereka (lihat perenggan 17).]

Notes

For cases on principal and agent, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2407–2408.

Cases referred to

Official Assignee, States of Malaya v Tat Fatt Shirts Manufacturers [1969] 1 MLJ 1, FC (refd)

Weiner v Harris [1910] 1 KB 190, CA (refd)

Manjeet Kaur (Manjeet K Sarjit & Co) for the plaintiff.
Vijay Raj (Skrine) for the defendant.

Noraini Abdul Rahman JC:

[1] The plaintiff, Lim Cheng Boon brought a suit against the defendant, F & N Dairies (M) Sdn Bhd for alleged breach of agency agreement which plaintiff alleged was made orally between F & N and the plaintiff. In the amended statement of claim, the plaintiff prayed for the following:

(a) special damages RM126,080 for 12608 crates returned to defendant ie at RM10 each;

(b) special damages for RM50,000 for goods returned by the plaintiff to the defendant;

(c) general damages for loss of business for RM5,000 per month from July 1998 till judgment date;

(d) general damages for RM20,000 for loss of clients;

(e) general damages for RM300,000 for breach of contract;

(f) 8% interest pa; and

(g) costs.

[2] The defendant in the amended statement of defence and counterclaim denies appointing the plaintiff as their agent. The defendant says that the transactions between them and the plaintiff were nothing more than sales and purchase of goods and crates. Accordingly, the relationship between them is nothing more than that of a buyer and seller.

[3] Further, the defendant counterclaims against the plaintiff for a sum of RM174,999, exemplary damages, interest and costs.

[4] I might add here that there is another case similar to this case ie MT1–22–988 of 1998. Both counsel, at the beginning of this trial on 2 February 2007 before the then judicial commissioner agreed that the decision in this case will bind that case.

[5] The issues to be decided as decided by both parties are:

(a) whether or not an agency exist between the plaintiff and the defendant;

(b) whether goods the defendant sold to the plaintiff by way of credit;

(c) whether the plaintiff continues to work for the defendant after the dissolution of 'Farm Fresh Partnership';

(d) whether the plaintiff has the duty to take goods from the defendant and whether the defendant has a duty to make an inventory of goods and number of crates taken by the plaintiff;

(e) whether the plaintiff is allowed to take goods from the employees of the defendant;

(f) whether the plaintiff can sell defendants' goods to the plaintiff's customers;

(g) whether the defendant will count the total number of crates and goods returned by the plaintiff which he cannot sell;

(h) whether the plaintiff will issue invoice/cash bill to the defendant to show number of crates and goods returned to the defendant;

(i) whether every crate returned by the defendant will be paid RM10 direct into the plaintiff's accounts;

(j) whether the plaintiff's accounts is controlled by the defendant;

(k) whether the defendant over credit into the plaintiff's accounts between the months of October 1997 to April 1998 for 4382 crates;

(l) whether the defendant make a mistake in the accounts;

(m) whether the defendant's claim for RM43,820 is because the defendant over credited additional number of crates into plaintiff's accounts;

(n) whether the defendant terminated the plaintiff's agency in a lawful manner including the stoppage of sale of goods to the plaintiff;

(o) whether the defendant can distribute goods direct to the plaintiff's customers and which the plaintiff now lose income and customers;

(p) whether the new management who took over the defendant in May terminate the plaintiff's agency;

(q) whether the plaintiff owes the defendant RM174,999.99; and

(r) whether the defendant owes the plaintiff RM126,080 for the crates returned to the defendants, general damages for RM50,000 loss of monthly income of RM5,000 from July 1998 to the date of judgment, general damages for RM20,000 for loss of the plaintiff's customers and general damages of RM300,000 for breach of contract and costs.

AGENCY

[6] Although both the plaintiff and the defendants agreed that there is no written contract on agency, I find that there is an agency between the plaintiff and the defendant because:

(a) the defendant's invoice marked as D8, bundle D mentioned the word 'salesman' in column 3 and is given a code No 2949.

(b) At p 252, bundle D, the plaintiff is described as a distributor by the defendant.

(c) DW3, during cross-examination said the name Magnolia belonged to the defendant company and the fact that in the plaintiff's invoice/cash bill in bundle B pp 1–134 bears the word Magnolia for Yeo's before the termination of the agency shows that there must be some approval or consent given by the defendant to put that logo on their invoice/cash bill.

(d) In normal cases, a customer or a buyer buying goods will not have an account kept by the seller let alone give a credit limit of 60 days to pay. This is not an everyday ordinary transactions. It is a term (though unwritten) that spoilt or damage goods could be returned and the plaintiff's accounts maintained by the defendant will be credited accordingly;

(e) That for each crate returned, a RM10 credit will be put into the plaintiff's account.

This is no ordinary buyer/seller transaction. It smells of agency. In the case of *Weiner v Harris* [1910] 1 KB 285 at p 291, Cozens-Hardy MR said:

> I have come unhesitatingly to the conclusion that this was a transaction in which Fisher was not and could not become the buyer of the goods, but a transaction in which Fisher was employed solely as agents … I think, almost sufficient to shew that *he could not be a buyer, because it is quite plain that no person who is an agent … can be allowed to buy that which he is instructed and authorised to sell*. (Emphasis added.)

(f) In the case of *Official Assignee, States of Malaya v Tat Fatt Shirts Manufacturers* [1960] 1 MLJ 1 a Federal Court decision, Azmi CJ (Malaya) held that the shirts in the present case were handed to Moghals for the purposes of sale to other people. *It was never intended that Moghals should buy the shirt themselves and therefore Moghals were simply agents for sale*. (Emphasis added.)

GOODS THE DEFENDANT SOLD TO THE PLAINTIFF IS BY WAY OF CREDIT

[7] This is answered by witnesses and documentary evidence. I need quote only one example ie p 1, *ikatan dokumen defendan* (bundle D) where under the several column under the heading 'Terms cash/credit' it was written that for Lim Cheng Boon (plaintiff), it is 60 days. I need say no more than that.

WHETHER THE PLAINTIFF CONTINUES TO WORK FOR THE DEFENDANT AFTER DISSOLUTION OF FARM FRESH PARTNERSHIP

[8] This issue is not crucial or relevant at all to the case. What is important is for the plaintiff to establish that there is an agency between the plaintiff and the defendant and that has been answered above.

[9] I will deal with issues 4, 5 and 6 together. The plaintiff is not under a duty to take goods from the defendant. None of the witnesses say so. However, because the plaintiff took goods and crates to re sell to his own clients for a credit of 60 days which is accorded to him by the defendant, the defendant, as a prudent commercial company would keep an inventory of goods and number of crates taken by the plaintiff. DW2 had also given evidence that goods can be taken from employees of the company (see

questions 8 and 9 of examination-in-chief of DW2, Mat Zin bin Karim).

WHETHER THE PLAINTIFF WILL ISSUE INVOICE/CASH BILL TO THE DEFENDANT TO SHOW NUMBER OF CRATES OR GOODS RETURNED TO THE DEFENDANT

[10] Refer to the examination-in-chief of DW2, Mat Zin bin Karim, question 13 where he said he or Faizul would sign the plaintiff's invoice/cash bill.

WHETHER EVERY CRATE RETURNED BY THE DEFENDANT WILL BE PAID RM10 DIRECT INTO THE PLAINTIFF'S ACCOUNT

[11] Yes, RM10 will be credited to the plaintiff's account for every crate returned.

WHETHER THE PLAINTIFF'S ACCOUNT IS CONTROLLED BY THE DEFENDANT

[12] As a prudent business organisation it will open an account and control it. Refer to witness statement of DW1, Mr Pok Yoong Sung questions 8, 42, 44, 45, 46. The accounts are opened by the defendant for the plaintiff for transactions with the company.

WHETHER THE DEFENDANT OVER CREDIT INTO THE PLAINTIFF'S ACCOUNT BETWEEN THE MONTHS OF OCTOBER 1997 TO APRIL 1998 FOR 4382 CRATES

[13] According to the testimony of DW1, Mr Pok Yoong Sung, at questions 59, 60, 61, 64 and 65 he explained why there is over credit of the plaintiff's account.

WHETHER THE DEFENDANT TERMINATED THE PLAINTIFF'S AGENCY IN A LAWFUL MANNER

[14] I had held earlier concluded that there was a relationship of agency between the plaintiff and the defendant. The defendant's witness Mr Pok Yoong Sung had stated at question 50 during examination-in-chief that 'In fact there is no written contract. So there is no issue of termination …'. Also the defendant's witness Mr Loong Wei Hin also stated at question 7 examination-in-chief that 'if there was no written contract between parties, no notice would be necessary'.

[15] However, during submissions, both counsel orally agree that a reasonable notice would be six months.

WHETHER THE DEFENDANT CAN DISTRIBUTE GOODS DIRECT TO THE PLAINTIFF'S CUSTOMERS AND WHICH THE PLAINTIFF NOW LOSE INCOME AND CUSTOMERS AND WHETHER THE NEW MANAGEMENT WHO TOOK OVER THE DEFENDANT IN MAY MAY TERMINATE THE PLAINTIFF'S AGENCY

[16] I do not see how these issues can affect the claims of either the plaintiff or the defendant. There was no evidence put before the court that the defendant now directly had taken over the plaintiff's clients, whether before or after new management had taken over the defendant company. In any event, the plaintiff has no product to sell to these clients because the defendant had already stopped him from taking their goods.

WHETHER THE PLAINTIFF OWES THE DEFENDANT RM174,999.99 AND WHETHER THE DEFENDANT OWES THE PLAINTIFF RM126,080 FOR CRATES RETURNED TO THE DEFENDANT, GENERAL DAMAGES OF RM50,000 LOSS OF MONTHLY INCOME OF RM5,000 FROM JULY 1998 TO DATE OF JUDGMENT, GENERAL DAMAGES FOR RM20,000 FOR LOSS OF PLAINTIFF'S CUSTOMERS AND GENERAL DAMAGES OF RM300,000 FOR BREACH OF CONTRACT AND COSTS.

[17] For the above issues, I would refer to the prayers in the statement of claim, statement of defence and counterclaim.

- Prayer (a)

  The plaintiff's counsel submits that the plaintiff arrived at the figure of RM126,080 by counting and relying on P1 ie invoice/cash bill which the plaintiff submitted to the defendant. A total of the calculation amounted to RM126,080.

  The defendant on the other hand counterclaimed that there is over credit paid to the plaintiff's account and after repeated reminders to the plaintiff had suffered losses of RM43,820 for crates and RM131,179.99 for goods sold to the plaintiff and also the claim by the plaintiff for RM174,999.99 is baseless.

  I am of the opinion that the claim of RM126,080 by the plaintiff is based solely on documentary evidence exh P1 and had not taken into account the various statement of accounts and also the letters at p 248, 250 accounts at p 242 in the defendant's bundle of

documents. It is counting the numbers in exh P1 and not comparing with other documents which defendant had sent to the plaintiff regarding over crediting. So, actually without counting what was paid and what was not in terms of returned crates, I am of the opinion that the claim is unreliable. Counsel for the defendant also submitted that the plaintiff's claim is baseless and inherently incredible.

The plaintiff had testified that he had not received almost all letters and documents sent to him which means that he did not actually know exactly or approximately his accounts with the defendant. The plaintiff had testified that he had placed full trust in the defendant and never questioned or asked for the accounts. Even though statement of accounts were sent to him, he said that some he received and some he did not. So, how could he be certain the amount he is claiming against the defendant in prayer 18(a) and (b). On this basis I am dismissing the plaintiff's claim in para 18(a) and (b). As for prayer (c) and (e) for which he is claiming RM5,000 a month for loss of business and RM300,000 for breach of contract, I am allowing a sum of RM3,218.40 x 6 months. This is based on the net profit of RM38,621 which he had submitted to the Income Tax Department for the year of assessment 1998 (p 137 of the plaintiff's bundle of document), the year relevant in his claim against the defendant. Since no notice was given, I hold that a notice of 6 months is reasonable and I am awarding a sum of RM19,310.50 with interest of 8% from July 1998 till the date of judgment with costs to be taxed by senior assistant registrar.

- Prayer (d)

  I am not awarding any claim because there is no proof that the defendant had used the plaintiff's list containing clients name to do business directly with them. Anyway what losses and what goods has he to sell to his clients. DW1, Steven Pok, in his letter to the plaintiff clearly said 'In view that the account is long overdue we have stop further supplies WITH IMMEDIATE EFFECT'. (Emphasis added.)

[18] I now turn to the counterclaim of the defendant. The defendant counterclaimed for a sum of RM174,999.99 being RM43,820 for over credit for the excess crates and a sum of RM131,179 for goods sold and delivered to the plaintiff. There were letters and documents sent by the defendant to the plaintiff (see Steven Pok's letter dated 21 July 1998 and also Details of Outstanding Balance Owed by Lim Cheng Boon – A/C 4720023 at p 24 of the defendant's bundle of documents (prepared by DW1, Pok Yoong Sung).

[19] I allow this counterclaim with costs to be taxed by the senior assistant registrar.

[20] I am not allowing the counterclaim for exemplary damages.

[21] The decision of this case binds the Case No MT1–22–988 of 1998.

Plaintiff's claim allowed in part with costs and defendant's counterclaim allowed in part.

Reported by Kanesh Sundrum